

1 possibility that they share [REDACTED] or more  
2 of their viewers?

3           A       I cannot rule out that  
4 possibility.

5           Q       What about competing for  
6 advertising?

7           A       I view the advertising market as  
8 quite broad. I mean, there are obviously  
9 sports-specific advertisers, so there's  
10 tailor-made, may only advertise on the Golf  
11 channel, and won't consider any other channel  
12 a substitute except for say, ESPN, or CBS when  
13 they actually carry golf.

14          Q       What about if you rule out those  
15 two?

16          A       The sports-specific advertisers, I  
17 believe, a company like Ford, for example, or  
18 perhaps I should pick somebody other than a  
19 car company right now - has many different  
20 avenues to reach eyeballs. And, so, the  
21 market is very broad. They have many options  
22 on how to reach folks. But, again, I go back

1 to the issue of they may be substitutes to  
2 some degree, but they may be quite far away  
3 from each other in product space.

4 Q And you haven't done that  
5 analysis, either. You have done an analysis  
6 of how much of a substitute those networks are  
7 from an advertisers point of view, have you?

8 A No, I have not, not a statistical  
9 analysis.

10 Q Can you rule out the possibility  
11 that they compete, let's say Versus and the  
12 NFL Network, compete with respect to more than  
13 [REDACTED] of their advertisers?

14 A From a competition perspective,  
15 that fact alone isn't a relevant fact, because  
16 they may be competing with 30 other channels.  
17 And, so, I have not ruled out the possibility  
18 that they overlap, but one would have to  
19 consider who else is competing for that  
20 business.

21 Q Thank you. Are you aware that  
22 Versus and the NFL Network compete for

1 programming?

2           A       I am aware of two examples in  
3 which they -- one example where they've  
4 directly competed for programming, and one  
5 example where Versus was unable to compete,  
6 because it didn't meet a threshold.

7           Q       What was the example where they  
8 directly competed?

9           A       The eight-game package.

10          Q       What was the second example?

11          A       There was a college sports  
12 conference in which it said that they need to  
13 have, I believe, [REDACTED] subscribers in  
14 order to even get into the bidding process.

15          Q       And who ended up securing those  
16 games?

17          A       I believe Versus did.

18          Q       Over the NFL Network?

19          A       No.

20          Q       Was the NFL Network competing for  
21 those games?

22          A       Well, as I -- we've discussed in

1 my deposition, the NFL Network never  
2 qualified, in some sense, to bid. And the  
3 bidding occurred between Comcast and whomever  
4 else was part of the auction, I use quotes  
5 around that, process.

6 Q The NFL never qualified, because  
7 it didn't have enough subscribers. Right?

8 A Right. And even getting carriage  
9 on expanded basic wouldn't get them there.

10 Q It didn't qualify, because it  
11 didn't have enough subscribers. Correct?

12 A My understanding from the  
13 documents is that they needed to have [REDACTED]  
[REDACTED] subscribers to qualify.

15 Q Thank you. But they were trying  
16 to secure those games, weren't they? Yes or  
17 no?

18 A They wanted to try to bid on those  
19 games.

20 Q Thank you. Now, they also  
21 competed for the eight-game package, as you  
22 mentioned. Right?

1           A        Yes.

2           Q        Are you aware that Brian Roberts  
3 has testified that the eight-game package  
4 would have been the single biggest content  
5 purchase in the history of Comcast?

6           A        I have not seen that precise  
7 language.

8           Q        Do you dispute that?

9           A        I would not dispute that.

10          Q        So that would by definition, I  
11 think, be the largest content acquisition  
12 effort in Versus' history. Correct?

13          A        By definition, yes.

14          Q        And it was also the most valuable  
15 programming that the NFL Network ever secured.  
16 Correct?

17          A        Again, from an economist  
18 perspective, the valuable programming, I'm  
19 worried about the use of the word "valuable".

20          Q        The money it could generate for  
21 that programming.

22          A        I will accept that

1 characterization of value.

2 Q Okay. And, so, in that regard,  
3 for the most expensive programming that those  
4 two channels had ever sought to acquire, they  
5 competed for that programming. Right?

6 A Yes, they did.

7 Q Do you believe that the NFL  
8 Network was harmed in any way when Comcast put  
9 it on a sports tier?

10 A Well, you should define "harm".

11 Q Did they suffer any harm?

12 A They had, I believe, increasing  
13 advertising revenue. If you look at, which I  
14 heard from Mr. Furman, if you look at license  
15 fees that they received, they received fewer -  
16 - lower amount of license fees from Comcast.

17 Q Have you done an analysis to see  
18 what their advertising would have been had  
19 they not been tiered?

20 A No, I have not.

21 Q Do you have any reason to  
22 challenge the proposition that had they not

1 been tiered, their advertising revenue would  
2 have been higher?

3       A       That one fact alone?

4       Q       Yes.

5       A       So your hypothetical you're asking  
6 me is assume nothing else changes.

7       Q       Yes.

8       A       I have not conducted that analysis  
9 to confirm or deny it, but I -- it's  
10 reasonable to assume that they would have  
11 higher total advertising revenue.

12       Q       Wouldn't you expect that if you  
13 shrink your subscriber base, it limits your  
14 total advertising revenue?

15       A       Again, we talked about this in my  
16 deposition. In general, yes. But, although  
17 you may be able to target more highly valuable  
18 customers, and so it may actually go the  
19 opposite direction because of that.

20       Q       In general, though, less  
21 penetrated networks have lower ad revenues.

22       A       Lower total ad revenues, yes.

1 Q Do you remember during your  
2 deposition I asked you to give me an example  
3 of how you might make an assessment of whether  
4 discrimination had occurred?

5 A Yes, I do.

6 Q And I think you said you would  
7 look at how other MVPDs carried the NFL  
8 Network. Right?

9 A Yes.

10 Q You would look at how Comcast  
11 carried it. Right?

12 A Yes.

13 Q You would look at how other MVPDs  
14 carried the Comcast-affiliated networks?

15 A I think I put less weight on that  
16 when we discussed it, but yes.

17 Q And you would look at how Comcast  
18 carried the Comcast-affiliated networks.  
19 Right?

20 A Again, putting less weight on  
21 that.

22 Q Okay. But that's what you said.

1 Right?

2 A Right.

3 Q And you're not changing that, are  
4 you?

5 A Not at all.

6 Q In fact, when I asked you that, I  
7 said you said, I think that's a fair  
8 characterization. Right?

9 A Yes. That sounds about right.

10 Q You didn't say anything in your  
11 deposition about putting less or more weight  
12 on that.

13 A I thought I said I would focus on  
14 -- if my recollection is correct of the  
15 precise language, and I may -- I believe it  
16 was in there, I said I'd focus on the carriage  
17 decisions of other MVPDs of the NFL Network  
18 versus the carriage decision of Comcast. I  
19 believe that was the language that I  
20 discussed. And I believe I also discussed how  
21 one would look at -- because that would infer  
22 whether it's profitable for non-vertically

1 integrated cable companies to carry it or not,  
2 which is what we're really trying to get after  
3 here.

4 Q Mr. Orszag, you said that price is  
5 only one factor that cable companies look to  
6 in deciding whether or not to carry a network.  
7 Right?

8 A Yes. I think I said it was the  
9 most important factor, but there are other  
10 factors they consider.

11 Q Okay. And you wouldn't make a  
12 decision -- you wouldn't purport to offer  
13 testimony about how -- let me strike that.

14 You wouldn't tell the Court, would  
15 you, that price is the only factor?

16 A Of course not.

17 Q In fact, in your written testimony  
18 you've identified other factors, haven't you?

19 A Yes.

20 Q I'm going to ask you to put that  
21 written testimony in front of you, what's been  
22 marked as Comcast Exhibit 24.

1 JUDGE SIPPTEL: Give us a page,  
2 please.

3 MR. SCHMIDT: I'd like to direct  
4 your attention to -

5 THE WITNESS: Is paragraph 51 that  
6 you're looking for?

7 MR. SCHMIDT: Not yet.

8 THE WITNESS: Okay.

9 MR. SCHMIDT: Page 26, paragraph  
10 41. Are you with me there?

11 THE WITNESS: Yes, I am.

12 BY MR. SCHMIDT:

13 Q You say in this first sentence,  
14 "The overall carriage of sports networks" -  
15 and I'm going to skip the parenthetical - "is  
16 a function of many more factors than just the  
17 year of launch, and the license fee." Right?

18 A Yes, I do.

19 Q The license fee is price. Right?

20 A Yes, it is.

21 Q Other factors include the network  
22 attributes.

1 A Yes.

2 Q The programming content.

3 A Yes.

4 Q Intensity of viewer interest.

5 A Yes. Would you mind reading the  
6 parenthetical there, so that people understand  
7 what the intensity of viewer interest means?

8 Q Okay.

9 A Do you want me to do that?

10 Q You can put it in later.

11 A Okay.

12 Q Other difficult to quantify  
13 characteristics, such as quality of  
14 production?

15 A Yes.

16 Q Have you done any analysis of  
17 quality of production versus NFL Network, or  
18 Golf, or Versus?

19 A As I noted, it's difficult to  
20 quantify. And, so, no, I have not done that.

21 Q And then you say you would look at  
22 other terms of carriage. Right?

1 A Yes.

2 Q And then I think where you were  
3 going was Paragraph 51, on page 33, where you  
4 list those other terms of carriage. Right?

5 A Yes.

6 Q And you do that, I believe, in the  
7 third sentence. Right?

8 A Right. I start with, "Price is an  
9 important element", and then in the third I  
10 continue to list the other important -- other  
11 elements.

12 Q And the first is protection  
13 against future price increases. Right?

14 A Yes.

15 Q The second is presence of other  
16 programming alternatives?

17 A Yes.

18 Q The third we've already talked  
19 about, whether competing MVPDs are carrying  
20 the network.

21 A Yes.

22 Q The opportunity costs of carriage.

1 Right?

2 A Correct.

3 Q There's no differentiation you  
4 make between the networks on that basis, is  
5 there?

6 A Which is the comparison, by the  
7 way, between networks now?

8 Q Golf versus the NFL Network.

9 A They're roughly the same. There  
10 may be some slight bandwidth differences based  
11 on the amount of action going on in the game.

12 Q Okay. The next one is the  
13 presence of a Most Favored Nation clause. And  
14 when I asked you if there are any differences  
15 you'd analyzed in your deposition, you said  
16 you didn't have any. Right?

17 A I think I said sitting here today,  
18 I didn't know if there were any differences.

19 Q Okay. The advertising  
20 availabilities offered by the profile. You  
21 weren't able to tell me any advertising  
22 differences offered between Versus, Golf, and

1 the NFL Network. Right?

2 A I think I said the same thing I  
3 just said, that sitting there, I didn't have  
4 a comparison of the contracts.

5 Q Required levels of advertising by  
6 the MVPD. You weren't able to identify those  
7 in your deposition, were you?

8 A I said, again, sitting there, I  
9 wasn't comparing the contracts.

10 Q Okay. And you were prepared for  
11 your deposition, weren't you?

12 A Correct.

13 Q You met with Mr. Toscano  
14 beforehand. Right?

15 A Yes, I did.

16 Q You submitted a written report  
17 beforehand.

18 A Yes, I did.

19 Q And you were even in the process,  
20 as I recall it, of writing your direct  
21 testimony. Right?

22 A That is correct.

1 Q So, you didn't walk in unprepared.

2 A No, I did not.

3 Q Okay. Let me skip down a couple.

4 There's a reference to video-on-demand, which  
5 we've heard a little bit about, VOD.

6 A Yes.

7 Q You haven't done an analysis, or  
8 you weren't able to point me to an analysis of  
9 differences between VOD provisions. Right?

10 A That is correct.

11 Q Although, you do know that the NFL  
12 Network agreement with Comcast included VOD  
13 provisions. Right?

14 A And I think I pointed that out in  
15 my deposition.

16 Q Okay. Internet streaming? You  
17 weren't able to point me to a difference  
18 between the networks on that basis. Right?

19 A I think I had the same answer that  
20 I've had on a few of these.

21 Q And, if I just run through the  
22 rest of these, is the answer the same for the

1 rest of these?

2           A        I believe -- I think we did have a  
3 discussion about exclusivity of content being  
4 different across the channels.

5           Q        Other than that, were there any  
6 differences you were able to point me to?

7           A        And I believe there is also the  
8 flexibility on the tiering that -- I don't  
9 think that came up in the deposition. I don't  
10 recall.

11          Q        Okay. You understand Comcast  
12 testimony -- Comcast's view is that they had  
13 flexibility in tiering the NFL Network.  
14 Right?

15          A        Correct.

16          Q        So, from Comcast's point of view,  
17 that was a good thing about the NFL Network.  
18 Right?

19          A        Options have values, yes.

20          Q        Maybe better than Versus and the  
21 Golf channel. Right?

22          A        I'm sorry. I don't understand

1 what you mean by "better".

2 Q Did they have the same flexibility  
3 of tiering, in your view, with respect to  
4 Versus?

5 A No, they have, I believe,  
6 increased flexibility, which is value. I  
7 understand.

8 Q Okay. Now, let me come back to  
9 exclusivity. There's been some talk that you  
10 may have heard about how when the NFL created  
11 these games, they somehow took them out of the  
12 public domain, and put them somewhere else.  
13 Right? Have you heard some of that talk?

14 A Yes.

15 Q Now, from your review of documents  
16 have you seen anything that suggests Comcast  
17 didn't want that result, so long as it could  
18 have those games on its own channel?

19 A It's not something I've sort of  
20 considered as part of my testimony here.

21 Q Well, was Comcast going to get  
22 non-exclusive rights to the eight-game

1 package? Did Comcast say - let me put it  
2 differently - did Comcast say we want to pay  
3 [REDACTED], and we want to give value  
4 representing [REDACTED] for these games, but  
5 we want to keep them in the public domain as  
6 much as possible. Did they say that? Do you  
7 see that?

8       A       Well, we just changed topics. We  
9 were talking about exclusivity relative to  
10 Golf and Versus, so -

11       Q       I'm asking a different question.

12       A       Okay. I just want to make sure  
13 we're on the same page.

14       Q       Yes. Can you answer my question?

15       A       I have not seen any documents that  
16 have suggested that they -- I know early on in  
17 the process they were seeking exclusivity.  
18 But then, the NFL said there's no chance that  
19 you'll get exclusivity, and they agreed to  
20 that provision.

21       Q       Okay. And, in fact, your point is  
22 that the NFL had -- you understand that the

1 NFL had a policy that said if there's a game  
2 involving a team from a city where someone  
3 lives, we're going to make sure they can watch  
4 that on regular network television. Do you  
5 have that understanding?

6 A Yes.

7 Q Comcast wanted the NFL to break  
8 that policy. Right? For them, just for them.

9 A My understanding is that in their  
10 first proposal, yes. But then they dropped  
11 that proposal.

12 Q Okay. Because the NFL wouldn't  
13 break it. Right?

14 A That is my understanding.

15 Q And you say that the games are  
16 devalued because of that, because the NFL  
17 wouldn't break its policy of making sure that  
18 people in the home market have access to their  
19 games. Right? That's your testimony.

20 A The games are less valuable to  
21 Versus when -- or the NFL Network when they  
22 are also not -- when they are available on the

1 over-the-air TV, free TV in the home markets,  
2 yes.

3 Q You offered that as Comcast's  
4 expert witness in this case. Right?

5 A Yes. It's an economic analysis.  
6 It makes sense.

7 Q And are you aware that the games  
8 that Comcast purchases, the hockey games that  
9 Comcast purchases from the NFL, those are not  
10 available in many, many instances on over-the-  
11 air broadcast, are they?

12 MR. TOSCANO: Objection.

13 BY MR. SCHMIDT:

14 Q Do you know that?

15 JUDGE SIPPEL: Wait, just a  
16 second. What's the objection?

17 MR. TOSCANO: Form.

18 MR. SCHMIDT: Let me try to  
19 rephrase.

20 JUDGE SIPPEL: Try it again.

21 Thank you. Sustain the objection.

22 MR. SCHMIDT: I'll withdraw the

1 question.

2 BY MR. SCHMIDT:

3 Q Are you aware that Comcast keeps  
4 the majority of the NHL, the National Hockey  
5 League games that it runs unavailable to  
6 people who want to watch them on the over-the-  
7 air broadcast in their home towns, when their  
8 hometown team is playing?

9 A You used the word "majority", and  
10 sitting here today, I don't know if it's a  
11 majority. But I understand that they have  
12 exclusive content in certain circumstances,  
13 yes.

14 Q And that's something Comcast has  
15 contracted for, they've asked for.

16 A Right. And that helps drive the  
17 value of Versus.

18 MR. SCHMIDT: I apologize for the  
19 slight delay.

20 JUDGE SIPPEL: Go ahead.

21 MR. SCHMIDT: Your Honor, may I  
22 approach?

1 JUDGE SIPPEL: Yes, you may. Come  
2 ahead, come ahead.

3 MR. SCHMIDT: I would like to give  
4 the witness what has been previously marked  
5 into evidence as Exhibit 121.

6 JUDGE SIPPEL: You may. Thank  
7 you.

8 I just want -- I mean, maybe this  
9 is only my observation, but it is 3:58.  
10 Actually, it is almost 4:00, and the -- I  
11 think we have lost power on the government-  
12 issued clock back there on the wall.

13 (Laughter.)  
14 Is it right?

15 THE WITNESS: It's right. No,  
16 it's just that the light is making it look  
17 like it's 3:00.

18 MR. CARROLL: The second hand is  
19 -- it says 4:00.

20 JUDGE SIPPEL: We've still got  
21 power? Okay. All right. All right. I'm  
22 sorry to interrupt for that.

1 MR. CARROLL: It is a different  
2 time zone.

3 (Laughter.)

4 We have all moved to Chicago. We  
5 are going back in time.

6 JUDGE SIPPEL: Go ahead. Go  
7 ahead.

8 BY MR. SCHONMAN:

9 Q Mr. Orszag, this is an article  
10 from someone named Jennifer Khoury. I'm  
11 sorry, this is an e-mail chain. The top e-  
12 mail in the e-mail chain is from Jeff Shell,  
13 who we discussed before, right?

14 A Yes.

15 Q And he is responding to an e-mail  
16 sent from someone named Jennifer Khoury. Do  
17 you know who that is?

18 A I don't know who Jennifer Khoury  
19 is.

20 Q Okay. She sends him an e-mail  
21 that attaches a media article. Do you see  
22 that?

1           A       Yes, I do.

2           Q       Let's look at the second page of  
3 the document, which reflects the media  
4 article. And if you look at the paragraph  
5 that begins at the very bottom -- are you with  
6 me -- it says, "Earlier this month when  
7 Comcast announced plans to move the NFL  
8 Network to a sports tier, I heard from several  
9 industry leaders complaining about what they  
10 called the 'cable giant's hypocrisy.' Some  
11 were even willing to go on the record. It is  
12 ironic that Comcast has no problem putting  
13 sports services down in expanded basic tiers,  
14 but relegate others to sports tiers. Said  
15 EchoStar Vice Chairman and President Carl  
16 Vogel, 'I'm not saying this is wrong, but it's  
17 disingenuous to say they are protecting  
18 customers from rising costs and giving choice  
19 to when the publicly-purported license fees of  
20 their regionals are two to three times more  
21 than your reported NFL Network rate.'"

22                   I missed some quotes, but it --